

Letter of Findings: 03-20120454P
Withholding Tax
For the Tax Period 2012

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ISSUES

I. Withholding Tax – Late Payment Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer seeks abatement of the penalty for late payment of employee withholding tax.

II. Withholding Tax – Late Filing Penalty.

Authority: IC § 6-8.1-10-6.

Taxpayer seeks abatement of the penalty for late filing of tax returns.

STATEMENT OF FACTS

Taxpayer is an S corporation doing business in Indiana. Taxpayer was assessed penalty and interest for the late payment of non-resident shareholder pass-through withholding tax which was paid after the due date of January 20, 2012. Taxpayer was also assessed penalty for the late filing of forms WH-3s and WH-18s submitted after the due date of February 28, 2012. Taxpayer timely filed its IT-20S by the April 15, 2012 date.

I. Withholding Tax – Late Payment Penalty.

DISCUSSION

Taxpayer argues that it is entitled to abatement of the penalty for late payment of withholding tax.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including an assessment of a penalty – is presumptively valid.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Taxpayer has provided sufficient information and documentation to show that it did not willfully neglect timely payment of its tax. Taxpayer's protest of the imposition of the penalty is sustained.

Taxpayer also protests the imposition of interest, however the Department may not waive interest as provided by IC § 6-8.1-10-1(e).

FINDING

Taxpayer's protest of the assessment of penalty is sustained. Taxpayer's protest of the assessment of interest is denied.

II. Withholding Tax – Late Filing Penalty.

DISCUSSION

Taxpayer protests the imposition of the penalty on Taxpayer's failure to timely file forms WH-3 and WH-18. IC § 6-8.1-10-6 states:

(a) As used in this section, "information return" means the following when a statute or rule requires the following to be filed with the department:

(1) Schedule K-1 of form IT-20S, IT-41, or IT-65.

(2) Any form, statement, or schedule required to be filed with the department with respect to an amount from which tax is required to be deducted and withheld under [IC 6](#) or from which tax would be required to be deducted and withheld but for an exemption under [IC 6](#).

(3) Any form, statement, or schedule required to be filed with the Internal Revenue Service under 26 C.F.R. 301.6721-1(g) (1993). The term does not include form IT-20FIT, IT-20S, IT-20SC, IT-41, or IT-65.

(b) If a person fails to file an information return required by the department, a penalty of ten dollars (\$10) for each failure to file a timely return, not to exceed twenty-five thousand dollars (\$25,000) in any one (1) calendar year, is imposed.

(c) For purposes of this section, the filing of a substantially blank or unsigned return does not constitute a return.

In this instance, Taxpayer has established that it qualifies for waiver of the penalty.

FINDING

Taxpayer's protest of the assessment of penalty is sustained.

Posted: 01/30/2013 by Legislative Services Agency

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